

ARKANSAS SUPREME COURT

No. CR 07-1002

GAVINO PATRICK MAZUREK
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered November 13, 2008

APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY, CR 2006-2376,
HON. CHRIS PIAZZA, JUDGE

APPEAL DISMISSED.

PER CURIAM

On November 11, 2006, appellant Gavino Patrick Mazurek entered a negotiated guilty plea to first-degree murder. Prior to his sentencing, appellant filed a motion to substitute counsel that was granted, and on April 4, 2007, appellant, represented by new counsel, filed a motion to withdraw the plea under Arkansas Rule of Criminal Procedure 26.1, based upon ineffective assistance of counsel. On April 18, 2007, the trial court held a hearing on the motion, denied the motion, and proceeded to sentence appellant to 420 months' incarceration in the Arkansas Department of Correction. The trial court entered a judgment and commitment order reflecting that decision on April 18, 2007.

On May 9, 2007, appellant filed a "PETITION/MOTION FOR POSTCONVICTION RELIEF" under both Arkansas Rule of Criminal Procedure 33.3 and Arkansas Rule of Criminal Procedure 37.1, requesting the trial court reconsider its previous ruling regarding the motion to withdraw appellant's guilty plea, and alleging ineffective assistance of counsel and error by the trial court during the plea proceedings. Appellant filed a notice of appeal as to the motion to withdraw the plea, the judgment, and the petition on July 3, 2007. In the notice of appeal, appellant cited

Arkansas Rule of Criminal Procedure 33.3(d) and contended, as he also does on appeal, that the petition was deemed denied on June 8, 2007. The appeal has been lodged in this court and the parties have submitted their briefs.

The State contends that appellant failed to file a timely notice of appeal. The State argues that the trial court did not have jurisdiction to consider a request to withdraw the plea under Rule 26.1, citing *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997). Rule 26.1(a) provides that a plea of guilty may not be withdrawn under the rule after entry of judgment.

This court has held that where a sentence has been entered and placed in execution prior to the filing of a motion to withdraw the guilty plea upon which it was based, the motion must be treated as having been made pursuant to Rule 37.1. *Mims v. State*, 360 Ark. 96, 199 S.W.3d 681 (2004) (per curiam). The fact that appellant cited Rule 33.3 in his petition does not convert the petition into a posttrial motion for relief. A deemed-denied ruling under Rule 33.3 is an insufficient order from which to raise a claim of ineffective assistance of counsel, in any event, and appellant's petition raising those claims must be treated as one based upon Rule 37.1. *See Maxwell v. State*, 359 Ark. 335, 197 S.W.3d 442 (2004).

Because we must treat appellant's petition as a petition under Rule 37.1 and not a posttrial motion for relief, Rule 33.3(c) did not serve to extend the time to file a notice of appeal as to the judgment or any prejudgment orders. If the judgment were appealable, under Arkansas Rule of Appellate Procedure – Criminal 2(a), notice of appeal must be filed within thirty days of the entry of judgment. Here, the notice of appeal was filed 103 days after the judgment was entered. The record does not reflect and appellant does not contend that any order was entered as to the petition. Under Arkansas Rule of Criminal Procedure 37.2(d), a decision on a Rule 37.1 petition is final when

the judgment is rendered. The deemed-denied appellate rule does not apply to appeals in proceedings on a Rule 37.1 petition. *Young v. State*, 373 Ark. 264, ___ S.W.3d ___ (2008) (per curiam) (citing *Morgan v. State*, 360 Ark. 264, 200 S.W.3d 890 (2005) (per curiam)).

The record does not reflect any order as to the petition that may be appealed. Accordingly, we dismiss the appeal.

Appeal dismissed.